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Division III  
State of Washington

NO. 36816-5-III

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

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STATE OF WASHINGTON,

Respondent,

v.

VICTOR JAMES MATHIS,

Appellant.

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Klickitat County Superior Court No. 18-1-00099-20

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BRIEF OF RESPONDENT

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DAVID QUESNEL  
PROSECUTING ATTORNEY

DAVID M. WALL, WSBA 16463  
Chief Deputy Prosecuting Attorney

Klickitat County Prosecuting Attorney  
205 S. Columbus Avenue, MS-CH-18  
Goldendale, Washington 98620  
(509) 773 – 5838

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A. STATEMENT OF THE CASE.

On August 8, 2018, following a jury trial, the defendant was found guilty of two counts of Unlawful Possession of a Firearm in the First Degree. *See State v. Mathis, No 36296-5-III*. The jury found beyond a reasonable doubt that the defendant had a prior conviction for a serious offense and had unlawfully been in possession of two firearms. RCW 9.41.040(1) and RCW 9.41.010 (27). To establish the prior conviction elements of first-degree unlawful possession of firearms, the State introduced certified copies of documents from the State of Georgia showing that a "Victor Lewis James" had been convicted of several felonies. Included in these documents was a "Final Disposition" dated April 17, 1991, showing a conviction by guilty plea to 10 counts, including armed robbery (count 1) and possession of firearm by convicted felon (count 10). The State's expert fingerprint examiner testified that Mr. Mathis's fingerprints taken during the booking process conclusively matched those of the person convicted of the Georgia crimes. The defendant was sentenced to a standard range that included some of the Georgia convictions which the sentencing court found to be comparable to Washington crimes. This Court affirmed the defendant's convictions in *State V. Mathis, No 36296-5-III*. The defendant did not raise the issue of comparability or his offender score in his prior appeal.

During trial, the defendant testified and denied that he was a

convicted felon or that he had gone under a different name. Specifically, he testified that he had “never gone by any other name.” RP 64-65 “Never been convicted of any felony out of the State of Georgia.” RP 65 “Never gone to prison.” RP 68 “Never been to Georgia.” RP 71 “If you got fingerprints from Georgia, you didn’t get my fingerprints from Georgia.” RP 71, 78-79. “Same fingerprints of Mr. James and not me.” RP 77. This testimony was rejected by the jury in reaching its verdict of guilty. The defendant also testified that he shared fingerprints with his twin half-brother from another mother and it was this brother, Victor Lewis James, who provided the fingerprints to the Georgia Department of Corrections. RP 66-67.

After an investigation by Detective Eric Anderson of the Klickitat County Sheriff’s Office, the State charged the defendant with one count of Perjury for material misstatements he made during his testimony. RP 31, RCW 9A.72.020(3). Specifically, the State alleged that the defendant lied under oath when he testified he was not a convicted felon and that he had not previously used any other name. CP 124.

Following a bench trial on May 6, 2020, the Honorable Randall Krog found the defendant guilty as charged. The Court’s reasoning behind the conviction is contained in his May 10, 2019 written order. CP 106-113.

The defendant was sentenced on the Perjury charge on May 20, 2019 to run consecutive to his sentence on the unlawful possession of a firearm charge. RP 120, CP 5.

The defendant now appeals his conviction alleging there is insufficient evidence to prove the crime of Perjury, that the Court improperly admitted evidence of the defendant's prior felony convictions, that the Court failed to exercise its discretion under the Sentencing Reform Act, and, despite the oral agreement and stipulation of the defendant and his counsel, that the Court failed to correctly calculate the defendant's offender score.

**B. SUFFICIENT EVIDENCE SUPPORTS THE DEFENDANT'S CONVICTION.**

A challenge to the sufficiency of the evidence admits the truth of the opposing party's evidence and all inferences which reasonably may be drawn from such evidence, and requires that the evidence be interpreted in the light most favorable to that party. Since this is a perjury case, however, it must also be kept in mind that the requirements of proof in such cases are the strictest known to the law, outside of treason charges. In such cases, the State must present: (1) the testimony of at least one credible witness which is positive and directly contradictory of the defendant's oath; and (2) another such direct witness or independent evidence of corroborating circumstances of such a character as clearly to turn the scale and overcome the oath of the defendant and the legal presumption of his innocence. *State v. Buchanan*, 79 Wash.2d 740, 489 P.2d 744 (1971); *State v. Wallis*, 50 Wash.2d 350, 311

P.2d 659 (1957); *State v. Olson*, 92 Wn.2d 134, 594 P.2d 1337, (1979). It appears undisputed that the defendant's statements were material and occurred during an official proceeding. See RCW 9A, 72.010(1)(4).

During the bench trial, the State presented sufficient evidence of the defendant's guilt. Goldendale Police Officer Jay Hunziker testified that the defendant, after making a full and knowing waiver of his Miranda rights, "admitted to me he was a convicted felon and was convicted of armed robbery and burglary in Georgia." RP 54. Jodi Dewey, a fingerprint examiner for the Washington State Patrol, testified that the defendant's fingerprints and those from the Georgia Department of Corrections were from the same source. RP 85-86. This testimony was deemed credible and was "directly contrary to the defendant's oath." Trial Court's Ruling of May 10, 2019 P. 3, CP 106-113. There was also evidence presented that Klickitat County Sheriff's Detective Eric Anderson was able to locate and obtain information regarding the birth of the defendant, Victor James Mathis, but was unable to locate the same information on a Victor Lewis James, the defendant's alleged twin. RP 35-36. Finally, the defendant's own confusing, incredible and extraordinary testimony that he shared fingerprints with his twin half-brother from a different mother was also offered as evidence. RP 65-78.

Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wash.2d 60, 71, 794 P.2d 850 (1990).

This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Cord*, 103 Wash.2d 361, 367, 693 P.2d 81 (1985); *State v. Thomas*, 150 Wn.2d 821, 83 P.3d 970, (2004). It is apparent the Court found the testimony of Officer Hunziker that the defendant admitted his prior convictions to be credible. The Court also found the testimony of fingerprint examiner Jodi Dewey to be credible that the fingerprint evidence conclusively matches the defendant's fingerprints with those of the person convicted of the Georgia crimes. RP 84-85. Ms. Dewey's evidence shows that despite the defendant's trial testimony, he had gone by a different name, been convicted of a felony out of Georgia, been in prison while present in the State of Georgia and had his fingerprints on record with the Georgia Department of Corrections. Finally, the defendant's claim that the fingerprints from Georgia belonged to Mr. James and not to him was incorrect and misleading because while they do belong to Victor Lee James they also belong to the defendant, Victor James Mathis, who is the same person, just using a different name in Washington State.

It is also apparent that the trial court drew permissible inferences from the defendant's testimony when it determined the defendant committed perjury. The most obvious inference being that to avoid criminal responsibility, the defendant had to deny, confuse and avoid the reality that, regardless of how incredulous his testimony was, over four hundred years

of scientific analysis shows that “no two individuals are known to have the same fingerprints” and all the fingerprint analyzed by Jodi Dewey were conclusively from the same source. RP 84-86. That source, whether he was calling himself Victor Lee James or Victor James Mathis, and whether the fingerprints were taken in Klickitat County or the State of Georgia, was the defendant. The defendant was in a position where he could not deny his possession of the firearms in question and his only option to avoid criminal responsibility, despite having already admitted and confirmed he was convicted of serious offenses out of Georgia to law enforcement, was to somehow blame his alias for the Georgia fingerprints and attempt to raise reasonable doubt in the minds of the jury. Had the defendant not engaged in his farcical testimony he would admitting guilt and that was something he was not prepared to do. Instead, he chose perjury.

In considering the credible testimony presented by Officer Hunziker, Jodi Dewey, Detective Anderson and the incredible testimony of the defendant, with all reasonable inferences to be drawn it from it, and looking at the evidence in a light most favorable to the State, a reasonable trier of fact would be justified, if not compelled, in reaching the decision that the defendant committed perjury. This, of course, is what the jury did when it convicted the defendant of the possession of firearms offenses and what Judge Krog did when he found the defendant guilty of perjury.

The defendant claims the Court’s reliance on the testimony of

fingerprint expert testimony that the defendant's fingerprints taken in Klickitat County and expertly compared to the Georgia fingerprint card from the Georgia Department of Corrections because "the fingerprint card was insufficient evidence of a felony convictions." *Brief Of Appellant p. 11*

However, this fingerprint evidence conclusively matches the defendant's fingerprints with those of the defendant, using an alias, when convicted of the Georgia crimes. Exhibit 2 is a certified copy from the Georgia Department of Corrections. It clearly shows a man going by the name of Victor Lewis James was an inmate with, and in the custody of, the Georgia Department of Corrections, that he signed the document with the name Victor James on 12/5/91, and that his charges included Possession of a Firearm by a Convicted Felon, Possession of Certain Weapons, Possession of a Weapon During the Commission of a Crime, Aggravated Assault and Armed Robbery. Most importantly, as established through expert fingerprint testimony, this man, Victor Lewis James, shares the same fingerprints with defendant, Victor James Mathis, taken in the Klickitat County Jail and from his Judgment and Sentence in the Klickitat County firearm charge. RP 86. The defendant's twin brother from a different mother who share the same fingerprints theory flies in the face of approximately four-hundred years of scientific study which has concluded that "no two individuals are known to have the same fingerprints, nor any one person's fingerprints the same from finger to finger." RP 84. Accordingly, this

evidence shows that despite the defendant's trial testimony, he has gone by a different name, been convicted of a felony out of Georgia, been in prison while present in the State of Georgia and had his fingerprints on record with the Georgia Department of Corrections. Finally, the defendant's claim that the fingerprints from Georgia belonged to Victor Lewis James and not to him was also incorrect and misleading because while they do belong to Mr. James they also belong to the defendant who is the same person, just using a different name in Washington State.

The trial court admitted the fingerprint card, Exhibit 2, into evidence pursuant to ER 803(a)(22). The court reasoned that:

“The second issue is then whether or not there is, the document is admissible and whether or not the document has any potential for exceptions to the hearsay rule. The prosecutor has argued that evidence rule 803(a)(22) is a basis for admitting this document and that document does say judgment of previous conviction, evidence of a final judgment entered after trial or upon a plea of guilty exceptions of any pleas (indiscernible).

In reviewing the documents it does appear that these are pursuant to pleas based upon page -- the third page of Exhibit 2 indicates that the State v. Victor Lewis James was concluded by plea, negotiated guilty on Counts 1 through 10. There was a prosecution order on Count 11. That's why I was trying to figure out what that was with regards to that and that appears to be the recidivist count pursuant to the special presentation that was provided in here. The document does then contain essentially the information as to all eleven counts, as well as the judgment and sentence -- final disposition, I guess is what it's called, in the State of Georgia. Essentially, the judgment and sentence indicating that the defendant is hereby sentenced to a confinement to a period on Count 1, twenty years, Count 2, aggravated assault,

ten years consecutive to Count 1, Counts 3 and 4, ten years concurrent with Count 2, Count 5, five years consecutive to Count 1 and then it went onto further outline that all the charges in this were sentenced as more than one year, which is requirement for a judgment of previous conviction for crimes punishable by imprisonment in excess of one year, which is shown by the documents showing that he was sentenced to up to a minimum of five years on any of these counts that are outlined in Counts 1 through 10.

So, with that said, I do change my position with regards to Exhibit Number 2 and do find that Exhibit 2 is admissible.”

RP 94-95.

Should this court find Judge Krog’s ruling and analysis unpersuasive, the fingerprint card is also admissible pursuant to ER 803(a)(8) as a public record and report. Courts review evidentiary rulings for abuse of discretion. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). A trial court abuses its discretion if it bases a ruling on untenable grounds or untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A trial court's ruling on the admissibility of evidence will not be disturbed if it is sustainable on alternative grounds. *State v. St. Pierre*, 111 Wn.2d 105, 119, 759 P.2d 383 (1988) (noting general rule). A reviewing court may affirm the trial court on any correct ground. *Nast v. Michels*, 107 Wash.2d 300, 308, 730 P.2d 54 (1986); *State v. Gresham*, 269 P.3d 207, 173 Wn.2d 405, (Wash. 2012); see also *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

ER 803(a)(8) adopts RCW 5.44.040 and provides that certified copies of public records are admissible evidence in Washington

courts. RCW 5.44.040; *State v. Chapman*, 98 Wn. App. 888, 991 P.2d 126, (Div. 3, 2000). RCW 5.44.040 provides that copies of records and documents filed in state or federal departments are admissible as long as they are certified under the official seals of the officers who have custody of them. A public record certified in this manner is self-authenticated. ER 902(d); *State v. Monson*, 113 Wash.2d 833, at 836-37, 784 P.2d 485 (1989). Not all authenticated public records are automatically admissible, however. *Id.* at 839, 784 P.2d 485. To be admissible, the public document must (1) contain facts rather than conclusions that involve judgment, discretion or the expression of opinion; (2) relate to facts that are of a public nature; (3) be retained for public benefit; and (4) be authorized by statute. *Id.* (citing *Steel v. Johnson*, 9 Wash.2d 347, 358, 115 P.2d 145 (1941)).

The fingerprint card in this case satisfies the requirements of ER 803(a)(8). Much like a driving record, the fingerprint card is "a classic example of a public record kept pursuant to statute, for the benefit of the public and available for public inspection." *State v. Monson*, 53 Wash.App. 854, 858, 771 P.2d 359, *aff'd*, 113 Wash.2d 833, 784 P.2d 485 (1989), quoted in *State v. Connie J.C.*, 86 Wash.App. 453, 456-57, 937 P.2d 1116 (1997). The Georgia General Assembly directed the Board of Corrections to promulgate administrative rules for the Department of Corrections Commissioner to follow. This language is found in O.C.G.A. (Official Code of Georgia Annotated) 42-2-11. The Board of Corrections

promulgated Ga. Comp. R. & Regs. 125-2-4-.05, which says that the Georgia Department of Corrections has to maintain files in order that inmate records may be maintained in a uniform and effective manner and that each institution shall employ a full-time Business and/or Records Manager who shall be specifically charged with responsibility for the care and maintenance of inmate records. Further, the Commissioner is obliged to comply with the regulations issued by the Board under O.C.G.A. 42-2-8(a). This fingerprint card contains neither expressions of opinion nor conclusions requiring the exercise of discretion.

C. THE STATE CONCEEDS THAT RESENTENCING IS REQUIRED PURSUANT TO RCW 9.94A.589(3).

It is clear from the record that the sentencing court failed to consider RCW 9.94A.589(3) when it imposed its sentence. While a sentencing court has total discretion in deciding whether a current sentence will run concurrently with, or consecutively to, a felony sentence previously imposed. *State v. Klump*, 80 Wn. App. 391, 396, 909 P.2d 317 (1996). A failure to exercise this discretion is itself an abuse of discretion subject to reversal. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). Accordingly, the trial court's failure to consider RCW 9.94A.589(3) requires remand for a new sentencing hearing. At that hearing, the trial court may properly consider consecutive versus concurrent sentences for

the defendant's convictions.

D. THE DEFENDANT STIPULATED TO HIS CRIMINAL HISTORY.

Although the State generally bears the burden of proving the existence and comparability of a defendant's prior out-of-state and/or federal convictions, our Supreme Court has ruled a defendant's affirmative acknowledgment that his prior out-of-state and/or federal convictions are properly included in his offender score satisfies SRA requirements. *State v. Ford*, 137 Wash.2d 472, at 483, 973 P.2d 452 (1999); *State v. Ross*, 152 Wn.2d 220, 95 P.3d 1225, (2004).

It is apparent that defense counsel and the defendant stipulated to and waived any objection to the defendant's criminal history. At the beginning of the sentencing hearing, the State inquired about how the Court wished to proceed in light of the State's sentencing memorandum. RP 115, CP 41-105. At this point, the State was prepared to prove the defendant's prior convictions and perform a comparability analysis, but the Court, in an apparent attempt to streamline the process, had the following colloquy with defense counsel:

THE COURT: Okay, alright, I just want to make sure. No, Ms. Hoctor?

MS. HOCTOR: We're in agreement, Your Honor.

THE COURT: You're gonna agree and stipulate that the offender score is eight in this matter?

MS. HOCTOR: Yes.

THE COURT: And the standard range is seventytwo to ninety-six months?

MS. HOCTOR: Yes, Your Honor.

RP 115.

Following defense counsel's agreement and stipulation and after the State made its sentencing recommendations, the following exchange occurred between the Court, defense counsel and the defendant:

THE COURT: -- five with an offender score of nine is seventy-two to ninety-six. So, with regards to this, Ms. Hoctor, do you agree that the offender score is a nine in this matter?

MS. HOCTOR: Yes, Your Honor.

THE COURT: With his prior criminal history?

MS. HOCTOR: Yes.

THE COURT: This matter. Mr. Mathis, do you also stipulate and agree that your offender score is nine in this matter?

MR. MATHIS: Yes.

RP 118.

THE COURT: And you agree that the offender score is nine?

MS. HOCTOR: Yes.

THE COURT: Okay, alright --

MS. HOCTOR: It was the -- I thought he was saying a serious level of six, Your Honor. So, the five was the serious level that we did agree to, Your Honor.

THE COURT: Alright, with regards to this matter I do find that the offender score of nine is appropriate based upon the stipulation of the parties and also with regards to viewing Mr. Mathis' criminal history, both for those offenses from the unlawful possession of firearm case in 18-1-17-20 points as well as the offenses out of Georgia being comparable offenses after doing both a legal and a factual analysis of those offenses. I do find that they are comparable offenses for making an offender score of nine in this case, standard range seventy-two to ninety-six months.

RP 120.

After affirmatively acknowledging his prior offences and offender score at the sentencing hearing and preemptively preventing the State from the opportunity to prove the prior convictions and comparability, the defendant now challenges his criminal history and claims his attorney was ineffective.

Regardless of the defendant's attempt to take a second bite of this apple, this matter can best be addressed at the anticipated resentencing. In the spirit of traditional notions of fair play and substantial justice, the State would suggest that any resentencing should also include an opportunity for the trial court to perform a comparability analysis on the record at the resentencing. This will provide both parties a fair opportunity to advocate their positions at the same time and in the same forum.

D. CONCLUSION.

There was substantial evidence to support the defendant's conviction and it should be affirmed. Additionally, this court should return this matter to the trial court for resentencing.

Respectfully submitted this 14 day of July, 2020

/s/ David M. Wall

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David M. Wall, WSBA #16463  
Chief Deputy Prosecuting Attorney  
Klickitat County Prosecuting  
Attorney  
205 S. Columbus Ave.  
Goldendale, WA 98620  
509-773-5838

**KLICKITAT COUNTY PROSECUTING ATTORNEY**

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